

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 24, 2008

STATE OF TENNESSEE v. RICKY D. NELSON

Appeal from the Circuit Court for Bledsoe County
No. 69-2006 Buddy Perry, Judge

No. E2008-00421-CCA-R3-CD - Filed October 15, 2008

The defendant, Ricky Nelson, was convicted by a Bledsoe County Circuit Court jury of driving under the influence, a Class A misdemeanor, driving on a revoked license, a Class B misdemeanor, and driving without a license, a Class C misdemeanor. See T.C.A. §§ 55-10-401 (2004) (DUI), 55-50-301 (2004) (amended 2007) (driving without a license), 55-50-504 (2004) (amended 2007) (driving on a revoked license). The court merged the driving on a revoked license and driving without a license convictions. The trial court sentenced the defendant to serve eleven months and twenty-nine days in jail for driving under the influence and six months in jail for driving on a revoked license, to be served consecutively. The court also suspended the defendant's driving privileges for two years for violation of the implied consent law. See T.C.A. § 55-10-406. The defendant appeals, contending that insufficient evidence exists to support his convictions and that the court erred in imposing consecutive sentences. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Philip A. Condra, District Public Defender, and Mechelle Story, Assistant Public Defender, for the appellant, Ricky D. Nelson.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; James Michael Taylor, District Attorney General; and James William Pope, III, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the defendant's trial, Sergeant Tony Moore of the Bledsoe County Sheriff's Department testified that he responded to a dispatch to a residence on July 13, 2006. When he arrived at the location, the defendant was already inside an ambulance. He said he saw a "dirt bike" that had scratches on the front end and looked as if it had been laid on its side. He said he did not see license

tags on the bike or a helmet. He said he did not talk to the defendant at the scene but later did so at the hospital. He said he heard the defendant admit to another officer that he had been drinking. He said he noticed that the defendant's eyes were bloodshot and that in his opinion, the defendant was under the influence.

Mitchell Rice, an emergency medical technician, testified that he responded to a call for assistance for a motorcycle wreck. He said that he arrived at the residence to which he had been summoned and found the defendant standing in the yard. He said the defendant had a strong odor of alcohol and slurred speech. He said the defendant reported that he had been injured in a motorcycle accident that had "happened up the road just a little ways." He said the defendant also reported that he had some alcohol in his system but did not specify when he had consumed the alcohol. He said that the defendant refused treatment but that the defendant was transported to the hospital. He said the defendant showed signs of intoxication, but he could not say with certainty whether the defendant was under the influence.

Trooper Bobby Clevenger of the Tennessee Highway Patrol testified that he was dispatched to Big Springs Gap Road to respond to a call about a motorcycle wreck. He said that the defendant had already been taken to the hospital when he arrived and that he saw a small dirt bike propped up against a tree at the residence to which he had been called. He said the motorcycle had scratches on it and did not have a license tag. He said it was a dirt bike, not a street bike. He did not see a helmet at the scene.

Trooper Clevenger testified that he went to the hospital emergency room and talked to the defendant. He said the defendant reported that he was traveling home on Mountain Creek Road from his brother's house when he failed to negotiate a curve successfully. He said that he could smell alcohol as soon as he approached the defendant and that the defendant's eyes were extremely bloodshot. He said the defendant reported having had two beers at his brother's house before leaving to go home. He said that he took the defendant to the jail and that on the way, the defendant asked him the same question repeatedly. He said he did not have the defendant perform field sobriety tests because the defendant had one arm in a sling, two knee injuries, and a head injury. He said the defendant initially agreed to take a blood alcohol test but then changed his mind. He said he told the defendant that he would be charged with a violation of the implied consent law if he refused the blood alcohol test. He said he was "highly confident" the defendant was under the influence of alcohol.

Trooper Clevenger testified that he later returned to Big Springs Gap Road and located Mountain Creek Road. He said that both were public roads. He said that he determined from searching a national database that the defendant did not have a valid driver's license because his Florida driver's license was revoked. He identified a certified copy of the defendant's driving record which reflected the revoked status of his Florida driver's license. He said the defendant's report of having had only two beers sometime before 8:00 p.m. was not consistent with the strong odor of alcohol he noticed two and one-half hours later.

Paul H. Swafford, Jr. testified that he was a paramedic and that he responded to a call on Big Springs Gap Road on July 13, 2006. He said that when he arrived, the defendant was standing in the yard next to a damaged motorcycle and was holding his left arm. He said the defendant told him that he had wrecked and that the defendant pointed to a curve on Big Springs Gap Road. He said that the defendant admitted that he had been drinking and that the defendant had a strong odor of alcohol. He said the defendant refused immobilization treatment for a possible spinal injury. He said the defendant stated that he had not wanted anyone to call for help. Mr. Swafford offered his opinion that the defendant was “somewhat intoxicated.”

Mr. Swafford testified that a person with a head injury would have an altered mental status and would be disoriented and confused. He said that such a person’s speech would be different than usual and that the person often would ask repetitive questions. He said that if the defendant had a head injury, he would have likely been transferred from the local hospital to a level one trauma center. The defendant was convicted upon the foregoing evidence.

I

The defendant contends that the evidence is insufficient to support the driving under the influence and driving on a revoked license convictions. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The statutes under which the defendant was convicted state in pertinent part:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant . . .[.]

T.C.A. § 55-10-401(a)(1) (2004).

(a)(1) A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel, or the premises of any shopping center, manufactured housing complex or apartment house complex or any other premises frequented by the public at large at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor.

...

Id., § 55-50-504(a)(1) (2004) (amended 2007).

The defendant argues that the State failed to offer eyewitness proof of him driving, any proof regarding whether he had consumed any alcohol after the wreck, or any proof of the exact location of the wreck. However, the evidence in the light most favorable to the State is sufficient to support the defendant's convictions. The defendant admitted on the evening in question that he had been driving his motorcycle and had failed to negotiate a curve on a public roadway. The defendant also admitted having consumed alcohol at his brother's house before the wreck, and law enforcement and medical personnel offered their opinion that he was intoxicated. There was no indication that the defendant consumed after the wreck additional alcohol that resulted in his intoxication. The evidence demonstrates that the defendant's Florida driver's license was revoked at the time. The evidence sufficiently supports the defendant's convictions of driving under the influence and driving on a revoked license. The defendant is not entitled to relief on this issue.

II

The defendant also contends that the trial court erred in imposing consecutive sentences. He argues that the trial court failed to state a basis for consecutive sentencing other than the defendant's continued use of intoxicants as reflected in his criminal history in the presentence report. He argues that he is not a danger to society.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (2006). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that the defendant is an "offender whose record of criminal activity is extensive." T.C.A. § 40-35-115(b)(2) (2006). Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specifically recite the reasons" behind its imposition of a consecutive sentence. See State v. Donnie Thompson, No. M2002-01499-CCA-R3-CD, Maury

County, slip op. at 5 (Tenn. Crim. App. Mar. 3, 2003) (reversing the trial court's imposition of consecutive sentencing because it failed to make a finding under Tennessee Code Annotated section 40-35-115(b) and the record did not support a conclusion that the defendant met the consecutive sentencing prerequisites).

In the present case, the presentence report reflected that the defendant had numerous prior convictions from Florida, including a felony DUI conviction and misdemeanor DUI convictions, multiple convictions for driving with a suspended license, and drug and paraphernalia possession convictions. The defendant's probation had been revoked at various times in the past, and he had served time in the Florida Department of Corrections for the felony driving under the influence conviction. The defendant's convictions from Florida spanned much of his adult life.

In ordering consecutive sentencing, the trial court found:

I don't think it's necessary . . . for me to reiterate the driving record and I'm not going to re-summarize it, I'm just going to simply refer to the report itself, and it speaks for itself. The continued use of intoxicants and motor vehicles is a pattern that just continues to go on and on.

. . .

. . . The driving on revoked is to be consecutive to the DUI and I'm going to require him to serve the sentence and he's in the custody of the sheriff now.

Upon de novo review, we hold that the trial court did not err in imposing consecutive sentencing based upon the defendant's prior criminal history. Although not explicitly found by the trial court, the record amply supports a conclusion that the defendant is an "offender whose record of criminal activity is extensive." T.C.A. § 40-35-115(b)(2).

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE